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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. 248

INDIANA REVENUE BOARD, ET AL.,
Petitioners,

vs.

STATE OF INDIANA, on the relation of the City of Indianapolis, as successor in interest to the Mass Transportation Authority of Greater Indianapolis, a municipal corporation, and RICHARD M. GIVAN and JOHN F. NEFF,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF INDIANA

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No.

INDIANA REVENUE BOARD,
EDGAR D. WHITCOMB, Governor of the State of Indiana and as a Member of the Indiana Revenue Board,
JOHN K. SNYDER, Treasurer of the State of Indiana, and as a Member of the Indiana Revenue Board,
TRUDY SIABY ETHERTON, Auditor of the State of Indiana, and as a Member of the Indiana Revenue Board,
INDIANA DEPARTMENT OF STATE REVENUE
JAMES O. MATHIS, as Commissioner of the Indiana Department of State Revenue,
THE STATE BOARD OF TAX COMMISSIONERS,
JOSEPH D. GEESLIN, JR., CARLETON L. PHILLIPPE, and DURWOOD STRANG, as Members of the State Board of Tax Commissioners of Indiana,
RICHARD D. GREEN, as Inheritance Tax Administrator,

Petitioners,

vs.

STATE OF INDIANA, on the relation of the City of Indianapolis, as successor in interest to the Mass Transportation Authority of Greater Indianapolis, a municipal corporation, and RICHARD M. GIVAN and JOHN F. NEFF.

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF INDIANA

The Petitioners, INDIANA REVENUE BOARD, EDGAR D. WHITCOMB, Governor of the State of Indiana and as a Member of the Indiana Revenue Board, JOHN K. SNYDER, Treasurer of the State of Indiana, and as a Member of the Indiana Revenue Board, TRUDY SLABY ETHERTON, as Auditor of the State of Indiana and as a member of the Indiana Revenue Board, INDIANA DEPARTMENT OF STATE REVENUE, JAMES O. MATHIS, as Commissioner of the Indiana Department of State Revenue, THE STATE BOARD OF TAX COMMISSIONERS, JOSEPH D. GEESLIN, JR., CARLETON L. PHILLIPPI, and DURWOOD STRANG, as Members of the State Board of Tax Commissioners of Indiana, RICHARD A. GREEN, as Inheritance Tax Administrator, pray that a Writ of Certiorari issue to review the Judgment and Opinion of the Appellate Court, entered in these proceedings by the Appellate Court of Indiana on December 16, 1969. Petition for Rehearing denied by the Supreme Court of Indiana without opinion on March 13, 1969.

OPINIONS BELOW

The Judgment and Opinion of the Appellate Court of Indiana, sitting as a Court of original jurisdiction in this case, entered on December 16, 1969, is reported at — Ind. App. —; and 253 N.E. (2d) 725, and appears at Appendix A, infra pp. 1 to 25.

JURISDICTION

The Judgment of the Supreme Court of the State of Indiana denying petition for rehearing on petition to transfer the Order & Decision of December 16, 1969 was entered herein on March 13, 1970. This petition for cer-

tiorari was filed less than ninety (90) days from the date aforesaid. The jurisdiction of this court is invoked under 28 U.S.C., Sec. 1257 (3).

PARTIES

As stated at p. 9, *infra*, in the Statement of the Case, the Mass Transportation Authority of Greater Indianapolis, a municipal corporation, ceased to exist on January 1, 1970. Its apparent successor in interest is Respondent, City of Indianapolis, Richard M. Givan and John F. Neff, although not parties below, were granted judgment.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment XIV, § 1:

"* * * No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article 10, Sec. 3, Indiana State Constitution:

"Appropriations.—No money shall be drawn from the Treasury, but in pursuance of appropriations made by law."

Article 10, Section 1, Indiana State Constitution:

"Assessment and taxation.—The General Assembly shall provide, by law, for a uniform and equal rate of assessment and taxation; and shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal, excepting such only for municipal, educational, literary, scientific, religious, or charitable purposes, as may be specially exempted by law."

STATUTES

Although these petitioners do not request a constitutional construction of any statute there are various Indiana statutes that must be included in order that the questions here presented may be understood. These petitioners, therefore, submit at Appendix C pages 70 to 75 the following statutes:

House Enrolled Act No. 1818 Acts of 1967 General Assembly (never published), p. 70;
Ch. 20 Acts of 1969 repealing House Enrolled Act No. 1818 *id.* p. 71;

The section of the mandate statute dealing with mandate judgment Acts 1881 (Spec. Sess.) Ch. 38 § 819 as amended and found in Burns' Indiana Stat. § 3-2206, p. 72;

Acts of 1905 Chapter 169 Section 520 Volume 4, (1946 Replacement) Burns Indiana Statutes Annotated § 10-3715, p. 72;

Acts of 1859, Chapter 138, Sections 7 and 8 as amended and found in Volume 10, Part 1 (1964 Replacement) Burns' Indiana Statutes Annotated, Sections 49-1809, 49-1810, p. 72-73;

Acts of 1852, Chapter 7, Section 2 as the same appears in Volume 10, Pt. 1 (1964 Replacement) Burns' Indiana Statutes, Sec. 49-1702, (Item Fifth), p. 73;

The statutes dealing with substitution of parties Acts 1881 (Spec. Sess.) Ch. 38 § 23 and § 848 Volume 2 Pt. 1 (1967 Repl.) Burns' Ind. Stat. §§ 2-227, 2-228, p. 73;

Portion of statute providing for removal of cases to the Indiana Appellate Court Acts 1965 (2nd Spec. Sess.) Ch. 7, Volume 2 Pt. 2, (1968 Repl.) Burns' Ind. Stat. §3-2129, p. 74;

STATEMENT OF THE CASE

Stat. § 3-2129. This act provides that, in cases of state wide importance, the Attorney General of Indiana, in his discretion, may remove the same to the Indiana Appellate Court which hears the case as a court of original jurisdiction.

On December 27, 1968 the *dissenting* opinion of the Appellate Court upholding the validity of the "pocket veto" was filed. Appendix B1 pages 36 to 41. On December 31, 1968 the *majority opinion* of the Appellate Court holding the "pocket veto" to be invalid was filed. *State ex rel. Mass Transp. Auth. v. Indiana Rev. Bd.*, — Ind. App. —, 242 N.E. (2d) 642 (1968); Appendix B1 pages 25 to 36.

II

POST JUDGMENT PROCEEDINGS

On January 1, 1969, the personnel of the Appellate and Supreme Courts of the State of Indiana changed and the Judges elected in the November, 1968 election replaced four (4) of the eight (8) Judges on the Appellate Court. One of the Attorneys for Respondent, Richard M. Givan on the same date became one of five Judges on the Supreme Court and has abstained from all proceedings in this case.

Petition to Transfer was filed with the Supreme Court of Indiana on January 10, 1969 which was denied, two (2) judges voting for transfer with a written opinion, two (2) judges voting against transfer with a written opinion, Judge Givan abstaining. *State ex rel. Mass Transp. Auth. v. Indiana Rev. Bd.*, — Ind. —, 244 N.E. (2d) 111 (1969); Appendix B2, pp. 42 to 69 inclusive.

The Indiana legislature meets every two (2) years; the 1969 Legislature passed Chapter 20 Acts of 1969 which on February 12, 1969, the Governor signed into law, repealing House Enrolled Act No. 1818 retrospectively and declaring an emergency, meaning it took effect on the Governor's

signature. On February 28, 1969, Plaintiff filed its Verified Petition For Order For Payment Of Funds. Also, Plaintiff's Attorney, John F. Neff, filed a Verified Notice Of Intent To Hold An Attorney's Lien on behalf of himself and Richard M. Givan for ten per cent (10%) of the recovery realized for the year 1967.

Defendants filed their Motion To Dismiss Respondent's Verified Petition For Order For Payment of funds on April 11, 1969 and Respondents filed Answer to said Motion To Dismiss on April 21, 1969.

On October 21, 1969, the Court overruled the Motion To Dismiss, granted Plaintiff's Verified Petition For Order For Payment Of Funds and issued its mandate, as prayed for in the verified petition, ordering the Treasurer of the State to certify the amounts due Respondent to the Auditor of the State of Indiana and ordering the Auditor to draw her warrant. In this Order, the Court *sua sponte* substituted all of the Petitioners except John K. Snyder, Treasurer, as parties, in lieu of their predecessors in office. The Auditor of the State, Trudy Slaby Etherton, had been in office since December 1, 1968, thirty days before the decision of December 31, 1968.

An amended Order was issued on November 6, 1969 rescinding and correcting defects in the order of October 21, 1969.

These Petitioners attempted to transfer (appeal) the order of November 6, 1969, to the Indiana Supreme Court said transfer being denied when Judge Givan abstained, two voted for transfer and two against transfer. Petitioners also filed a motion for a new trial which was dismissed and expunged from the record by order of the Appellate Court. The Appellate Court also ordered that the Response of the Auditor of the State of Indiana addressed to the order of

November 6, 1969 showing she had been in office prior to judgment and had never received a notice or hearing be stricken and expunged from the record as a sham pleading on the same day it was filed, November 19, 1969. (The Docket Book record of filing the latter pleadings was in fact crossed out.)

When the Petitioner John K. Snyder, Treasurer, to whom the first portion of the mandate was directed, as prayed by Respondent and ordered by the Court, showed by verified response that it was impossible for him to comply with said mandate, the order of November 6 was replaced by an order of November 19, 1969 completely different in terms and in its requirements of these Petitioners. This action was on the Court's own motion and without any request from Respondent.

The Order of November 19, 1969 required all Petitioners to compute the amount due to the Respondent under House Enrolled Act No. 1818 or to file verified responses showing that they did not have the records necessary to make this computation.

The appropriate figures were filed by the Inheritance Tax Administrator. And on December 16, 1969, again without an additional request, a new and different order of mandate was issued directing the Auditor to draw her warrant in favor of Respondent. Appendix A p. 23. At the same time, the Appellate Court issued a written opinion dealing with some of the questions presented by these Petitioners in response to the three (3) previous orders. Opinion at Appendix A. pp. 1 to 22, inclusive.

Petitioners filed their Petition To Transfer to the Indiana Supreme Court on January 5, 1970, and it was denied without opinion on February 3, 1970. Petition for Rehearing filed on February 24, 1970 was denied without opinion on

March 13, 1970. Both petitions were denied with Judge Givan abstaining, two voting for transfer and two against transfer.

On December 23, 1969, the Respondent filed a Verified Information And Affidavit For Rule To Show Cause. The Rule was issued and on February 26, 1970, Truly Slaby Etherton, Auditor, was found guilty of contempt and committed to the Sheriff to be held in the Marion County Jail. On March 4, 1970, the Auditor, under protest issued her warrant for $12,737,338.97 to the Clerk of the Supreme and Appellate Courts and purged herself of contempt.

The contempt proceedings will be brought forward by separate Petition for Certiorari.

On January 1, 1970, the Mass Transportation Authority of Greater Indianapolis, a municipal corporation, herein referred to as MTA, was terminated as a corporate entity. Acts 1969 Ch. 173, Sec. 1003; Burns' Ind. Stat. § 48-9353. Since that date the case has been continued by the Court as though said corporation, MTA, still existed. Respondent has asked for substitution of a proposed successor and Petitioners have objected to proceeding without a Relator competent to maintain the action.

The recipients of the money paid by the state on March 4, 1969 are City of Indianapolis, $11,909,752.60, and Richard M. Givan and John F. Neff, $827,586.57. Since these are the recipients of the money paid, they are joined as respondents.

This Petition covers the proceeding to and including the Judgment and Opinion of December 16, 1969, the petitions for transfer and rehearing of the Judgment and Opinion, and the denial of these petitions by the Supreme Court.

III

HOW THE FEDERAL QUESTIONS WERE RAISED

1.

The opinion of December 16, 1969, giving the ruling of the Appellate Court (trial court) with reference to the ineffectiveness of a retroactive repeal of an appropriation act and the newly announced doctrine that sovereignty had been waived by the participation of state officials as defendants, along with the Supreme Court's tacit approval by denial of transfer, made it clear, for the first time, that the mandate order of December 16, 1969 would be enforced as a money judgment to favor one county to the prejudice of the ninety-one (91) other counties.

The equal protection question was first presented to the Supreme Court on February 24th, 1970 in "Petition for Rehearing."

2.

The due process question of notice and hearing under the United States Constitution as to all defendants was presented to the Indiana Appellate Court as trial court in a Motion for New Trial filed on the 14th of November, 1969; also, as to Trudy Slaby Etherton in the Response of Trudy Slaby Etherton, Auditor, to the Order of November 6th, 1969 filed on the 19th of November, 1969. Both of the above pleadings were stricken from the record on November 19th, 1969.

The due process question under the United States Constitution was presented to the Indiana Supreme Court on February 24, 1970 in a Petition for Rehearing with Brief, which was denied.

3.

Lack of due process in the entire proceedings under the Fourteenth Amendment to the United States Constitution

was first raised on Petition for Rehearing, with Brief, filed on February 24, 1970 seeking transfer of the Order and Opinion of December 16th.

QUESTIONS PRESENTED

1. Whether the Appellate Court's (trial court's) Mandate of December 16, 1969 directing Petitioners to distribute money from the general fund, pursuant to repealed House Enrolled Act No. 1818, which mandate, in operation and effect, applied only ten per cent (10%) of the Inheritance Tax assessed and collected in Marion County in 1967 and 1968 to state purposes but applied 90% of the Inheritance Tax assessed and collected in the ninety-one (91) other counties in 1967 and 1968 to state purposes is repugnant to the equal protection clause of Sec. 1 of the Fourteenth Amendment to the United States Constitution?

2. Whether the Appellate Court's (trial court's) Mandate of December 16, 1969, with full knowledge of Respondent's failure to (1) give notice to Trudy Slaby Etherton as Auditor of the State and (2) cause her substitution as a party defendant with opportunity for hearing prior to judgment as required by Indiana law, is repugnant to the due process clause of Sec. 1 of the Fourteenth Amendment of the United States Constitution?

3. Whether (A) the actions of the Indiana Appellate Court in (1) entering the so-called judgment on December 31, 1968 instead of shortly after the vote referred to in a foot note to said Opinion; (2) entering said judgment against John P. Gallagher as Auditor one month after his term of office had terminated and the term of Trudy Slaby Etherton had commenced; (3) joining said Trudy Slaby Etherton and other Petitioners *sua sponte* more than nine months after judgment; (4) refusing to allow Trudy Slaby

Etherton to be heard on the constitutionality of House Enrolled Act 1818 under the State Constitution; (5) striking the Verified Response of Trudy Slaby Etherton on November 19, 1969, (a few hours after its filing) in which she set up the facts as to when her term of office started and John P. Gallagher's terminated, and that she had not been served with notice or given a hearing on the merits; (6) after entering mandate, as requested by Respondent, *sua sponte* without evidence including a judgment in favor of Respondent attorneys, rescinding same, at Respondent's request, to issue a new mandate, with a judgment for Respondent attorneys, in conformity with Respondent's desires; when this proved wrong, *sua sponte*, without notice or request, issuing two additional successive mandates continuing to include a judgment for Respondent attorneys and containing terms inconsistent with each other and with the Respondent's prayer displays such judicial bias and partiality as to deny Petitioners due process; (B) together with Petitioners inability to obtain judicial review, other than denial of transfer (two judges for transfer, two judges opposed and Judge Givan abstaining) constitutes a proceedings repugnant to the due process clause of the Fourteenth Amendment?

REASONS FOR GRANTING THE WRIT

Not since the days of *Marbury v. Madison*, 1 Cranch 137 (1803) has there been a more unique confrontation dealing with the interpretation of constitutional separation of powers.

This court has resolved separation of powers in the area of public rights by the exercise of judicial restraint. Holding that public rights would be controlled by the congress even though by repeal or a curative act a judgment of this

court would be nullified. *Hodges et al v. Snyder et al.*, 261 U.S. 600 (1922).

Confusion reigns among the state decisions. A majority seem to follow the lead taken by this court. 171 ALR 1353.

The final court of appeal in each state must exercise restraint in interpreting its own powers with reference to rulings on legislative and executive acts if the constitutional separation of powers is to continue and not be negated by unchallenged judicial decrees.

It is not often that the operation and effect of a judicial decree so patently prefers the citizens in one geographic section of a state over the citizens of the balance of the state and thus violates the principles of the equal protection clause of the 14th Amendment.

This case could serve as an opportunity for valuable instructions and guidelines in this area.

The Appellate (trial) Court's judgment ordering the Auditor to issue her warrant, even though the Act making the appropriation and establishing the fund had been repealed, questions the integrity of Article 10, Section 3 of the Indiana Constitution and draws in question the power of the Legislature to control the Auditor's warrant under said Article 10, Section 3 by the following statutes; Burns' Ind. Stat. §§ 49-1702, 49-1809, 49-1810, and the Criminal Statute, Burns' Ind. Stat. § 10-3715.

Because of the precedent set in this case, the task of budgeting and providing sufficient funds for legitimate state purposes will be complicated by the uncertainty as to a trial court's being willing to abide by said Article 10, Section 3, and the statutory inhibitions controlling the issuance of the Auditor's warrant.

1. The decision below conflicts with the equal protection principles set out by this Court in *Raymond v. Chicago Traction Co.*, 207 U.S. 20 (1907).

In *Raymond, supra*, at pages 36 and 37, this Court assumed jurisdiction to see that a taxpayer, who was unfairly treated by a state agency through discriminatory assessment of taxes, was not deprived of his Constitutional guarantees under the Fourteenth Amendment. In that case, this Court declared that the equal protection clause of the Fourteenth Amendment would protect the taxpayer suffering such discrimination.

The same protection was extended in *Home Tel. and Tel. Company v. Los Angeles*, 227 U.S. 278 (1913). There are other cases dealing with this same question but they all stand for this proposition:

> State action which operates unequally so as illegally to favor one taxpayer, or single class of taxpayers, to the prejudice of all others or illegally to discriminate against one taxpayer or a single class of taxpayers to the benefit of the many is repugnant to the equal protection clause of the Fourteenth Amendment and entitled to review.

The Court below established House Enrolled Act 1818 as a valid law on December 31, 1968, two years after the enactment and veto of said act, and found Respondent entitled to a mandate. Said Act provided that 90% of the State Inheritance Tax assessed and collected in a county would be used by that County for local purposes. Citizens in each county would enjoy a lower tax rate or receive greater local benefits for the same local rate.

The State Legislature repealed House Enrolled Act 1818 retroactively on February 12, 1969, which repeal has been held constitutional and valid, by the trial Court, in all

respects except as to Respondent's rights to mandate, its share of the tax money.

The unequal treatment is clearly spelled out in the lower Court's decision of December 16, 1969. That court's position that the repeal although valid was an encroachment on the judiciary is as follows:

> The rationale of the Pothoff decision indicates that the grant to an agency of the state does not, and cannot, vest rights and thus can be retroactively and prospectively repealed by the General Assembly. (Acts 1969, ch. 20) House Enrolled Act No. 1115 of the 1969 General Assembly was, therefore, a legitimate and constitutional exercise of legislative power.
>
> This squarely raises the effect of our judgment which preceded the action of the retroactive repealer. (Appendix A, p. 11.)
>
> * * *
>
> Plaintiff, Mass Transportation Authority of Marion County, Indiana, obtained, in this court, a judgment. Such judgment was entered of record on December 31, 1968. The effect of that judgment was to settle the respective interests of the parties to the suit. Subsequently, the General Assembly passed House Enrolled Act No. 1115 (Acts 1969, ch. 20), which we have just held was a legitimate exercise of legislative power. However, the application of House Enrolled Act No. 1115 with respect to the judgment in favor of the Mass Transportation Authority of Marion County was invalid. (Appendix A, p. 13.)
>
> * * *
>
> * * * However, the attempt to encroach upon the determination of a co-equal branch of Government was an unwarranted and unconstitutional action by the General Assembly, and its application to the judgment of this Court has no force and effect. It should be abundantly clear that this Court has no intention of sacrificing that which the constitution of

> this state guarantees to the judicial branch of Government. (Appendix A, p. 14.)

The Court's Order and Opinion awarding $12,[illegible] to the Respondent, City of Indianapolis, assures most of the citizens of Marion County of a lower tax rate, for the same local benefits, than the other counties in the State of Indiana. This Court has often held that judicial action is State action which will be reviewed when repugnant to the equal protection guarantee of the Fourteenth Amendment. Most recently, in *Shelley v. Kraemer*, 334 U.S. 1, p. 18 (1947), this Court held:

> The short of the matter is that from the time of the adoption of the Fourteenth Amendment until the present, it has been the consistent ruling of this Court that the action of the States to which the Amendment has reference includes action of state courts and state judicial officials. Although in construing the terms of the Fourteenth Amendment, differences have from time to time been expressed as to whether particular types of state action may be said to offend the Amendment's prohibitory provisions, it has never been suggested that state court action is immunized from the operation of those provisions simply because the act is that of the judicial branch of the state government.

One of the substantial reasons for granting this Writ is that the citizens of the ninety-one (91) counties in Indiana who did not have judgments at the time of the repeal need the protection of this Court or will have no opportunity to assert their opposition to the unequal treatment they receive under the Court's decree. It is, therefore, fitting that these Petitioners seek the reversal of the decision of December 16, 1969 on their behalf. These State Officers are qualified to raise these questions in this Court.

In *Hopkins Federal Savings and Loan Association v. Cleary*, 296 U.S. 235, 240 (1935), this Court held that the

appropriation act is an "unwarranted and unconstitutional" encroachment on a determination of the Judicial branch. The judgment must stand and be enforced, says the lower Court, even though it affects only public rights in public money in favor of a public corporation against the State, which created it.

The general rule is that when the legislature has the power to adopt such a statute in the absence of a judgment, the entry of a judgment does not convert the exercise of legislative functions into the exercise of judicial functions, even though the effect of the statute is to impair the judgment or render it ineffective. *Schneck v. Jeffersonville* 152 Ind. 204, 52 N.E. 212 (1898), *Hodges et al. v. Snyder et al.*, 261 U.S. 600 (1922).

Since February 12, 1969, the date when House Enrolled Act 1818 was repealed, there has been no appropriation, and the fund provided for in House Enrolled Act 1818 no longer existed. The Auditor's authority from the legislature required by Article 10, Section 3 of the Indiana Constitution was no longer in existence.

The Auditor, since the repeal, not only had no authority by law to draw a warrant as required by said Article 10, Section 3 and authorized by House Enrolled Act 1818 but was forbidden to draw her warrant, under the circumstances, by the following statutes:

Acts of 1852, Chapter 7, Section 2 as the same appears in Volume 10, Pt. 1 (1964 Replacement) Burns Indiana Statutes, Sec. 49-1702 (Item Fifth); Acts of 1859, Chapter 138, Sections 7 and 8 as amended and found in Volume 10, Part 1 (1964 Replacement) Burns Indiana Statutes, Section 49-1809 and Section 49-1810; Acts of 1905, Chapter 169, Section 520 as found in

Volume 4 (1956 Replacement) Burns Indiana Statutes, Section 10-3715, Appendix C pp. 72 and 73.

The discriminatory tax adjustment made by the lower court flows from that Court's insistence that its judgment in favor of Respondent, a public corporation, establishing public rights against its creator to tax funds from the State General Fund must not be impaired by the legislature. The statutory or legislative authority required by Art. 10, § 3 of the Indiana Constitution, to draw a warrant, cannot be supplied by a trial Court's mandate. *United States v. County of Clark*, 95 U.S. 769, 773 (1877), where the Court said:

> "A mandamus does not confer power upon those to whom it is directed. It only enforces the exercise of power already existing, when its exercise is a duty." See also, Indiana's Mandate Statute, Burns Annotated Statutes, Vol. 2, pt. 3, § 3-2205, Appendix C, p. 72.

Another factor contributing to the prejudicial nature of the Court's decree was the refusal of that court to recognize that with the repeal of House Enrolled Act 1818, this action changed from a mandate action requiring the Petitioners to perform their duties under House Enrolled Act 1818, to a collection proceedings against the State of Indiana, without the state's consent. The trial Court's mandate had thus become an execution against the state.

Consent to be made a party can be given by the state only by a legislative enactment clearly evincing such consent. *State ex rel. Ind. Dept. of Conservation v. Pulaski Cir. Ct.*, 231 Ind. 245, 251, 108 N.E. (2d) 185, 187 (1952).

A study of Indiana Sovereignty law is set out in *Ford Motor Co. v. Department of Treas. of State of Indiana*, 323 U.S. 459 (1943), at pages 467 to 469, both inclusive.

Article 4, § 24 of the Constitution provides:

> "Provision may be made, by general law, for bringing suit against the State, as to all liabilities originating after the adoption of this Constitution; but no special act authorizing such suit to be brought, or making compensation to any person claiming damages against the State, shall ever be passed."
>
> We interpret this provision as indicating a policy prohibiting state consent to suit in one particular case in the absence of a general consent to suit in all similar causes of action. Since the state legislature may waive state immunity only by general law, it is not to be presumed in the absence of clear language to the contrary, that they conferred on administrative or executive officers discretionary power to grant or withhold in individual cases. Nor do we think that any of the general or special powers conferred by statute on the Indiana attorney general to appear and defend actions brought against the state or its officials can be deemed to confer on that officer power to consent to suit against the state in courts when the state has not consented to be sued.

This is applicable today except in the area of proprietary activities of the State. Since this action involves only governmental activities and the Ford case has been cited with approval by the Indiana Supreme Court in *State v. Young*, 238 Ind. 452, 151 N.E. 2nd 697, 700 (1958), the above quotation is submitted.

It appears that when the officers as nominal parties have no personal liability and the action is in essence one for the recovery of money from the state treasury, the state is the real party in interest, even though the officers are the nominal defendants and the state's immunity will extend to and protect the officers.

2. The decision of the court below is inconsistent in principle with the requirements of due process established in this court in *Griffin v. Griffin*, 327 U.S. 220 (1946).

Notice and an opportunity to be heard are basic requirements of our judicial system which should have been but were not extended to Trudy Slaby Etherton, as Auditor, in office thirty-one (31) days prior to the entry of Judgment.

Two state statutes pertaining to substitution of parties were applicable to Petitioner, Trudy Slaby Etherton, when she became Auditor on December 1, 1968. (Acts of 1881 (Spec. Sess.), ch. 38, § 23 and § 848; Burns Annotated Statutes, 1967 Repl. 2-227 and 2-228; Appendix C, pp. 73 to 74.)

The action was commenced in 1967 against John P. Gallagher as Auditor. His term of office terminated on December 1, 1968 so that under Burns Ind. Stat., § 2-227, *supra*, he became a party defendant with a disability.

The action did not abate, and on motion or by filing supplemental complaint Respondent could have properly substituted the new Auditor, Trudy Slaby Etherton, by following the statutory procedure in the two statutes set out above and proceeded to judgment with proper parties defendant. (Burns Ind. Stat., § 2-227; Appendix C, p. 73.) Respondent failed to do this. Respondent did not, as was its duty, bring in the new Auditor, so that Trudy Slaby Etherton's right as Auditor to notice and to be heard before judgment set out in Burns Ind. Stat., § 2-228 could be saved. *Milich v. Schlesinger*, 156 Fed. S. 658 (1957).

Judgment was entered against John P. Gallagher as Auditor thirty-one (31) days after he had vacated office and thirty-one (31) days after Trudy Slaby Etherton had entered her term of office. Aid to Judicial Notice filed December 10, 1969; Appendix D, p. 76.

The judgment entered without the incumbent Auditor before the Court is lacking in due process under the Four-

teenth Amendment and is an invalid judgment as to the petitioner, Trudy Slaby Etherton, as Auditor. *Simon v. Craft*, 182 U.S. 427, 436 (1901).

Approximately eleven (11) months after judgment, that is, on October 21, 1969, Petitioner, Trudy Slaby Etherton, was served with an order from the trial court issued *sua sponte* purporting to bring her before the court for the first time. She was considered necessary for the collection proceedings but not for the decision on the merits.

On November 6, 1969 the order of October 21, 1969 was rescinded and ordered expunged from the records of this cause and a new order of mandate was issued. Again, on the trial Court's own motion, Petitioner, Trudy Slaby Etherton, was joined as a party defendant in her official capacity. On November 19, 1969, Petitioner, Trudy Slaby Etherton, filed a response to the November 6, 1969 order setting up the above facts as to service of summons and the lack of opportunity to be heard before judgment and pointing out that the procedure was inconsistent with the due process clause of the Fourteenth Amendment.

On the same day, November 19, 1969, the Chief Justice of the trial court ordered said response stricken from the record for the reason same is a sham, surplusage, tautology and irrelevant to the matter at issue. And a Docket Entry showing the filing of said response was obliterated from the Court Docket sheet.

In subsequent pleadings, Petitioners have objected to the lower court's *sua sponte* substitution of these petitioners during the collection proceedings after judgment, and the Court in its opinion of December 16, 1969, takes the position that the question is waived by the appearance of the parties. An examination of the pleadings and docket sheet will show that of these Petitioners only John K. Snyder was

served with notice in this action in the trial court. All of the other Petitioners were joined by the court's *sua sponte* substitution on October 31, 1969. The responsibility for substitution was the Respondents. *Milich v. Schlesinger*, 156 Fed.S. 658 (1957). For the court to substitute on its own motion was in excess of the court's power. *Montgomery v. Polk Milk Co.*, 118 Ind. App. 433, 440, 79 N.E. 2d 408 (1948).

The opinion of December 16, 1969 does not deal with or dispose of the failure to substitute Trudy Slaby Etherton, as Auditor, prior to judgment although this is the due process question.

Neither the Court nor Respondent has shown authority for the proposition that it was unnecessary to substitute Etherton for Gallagher, prior to judgment. Everything cited by the court and that found by these petitioners, including the statutes on substitution, makes it the duty of the Plaintiff to substitute a successor Defendant prior to judgment.

If this were not true, the requirements of due process announced by this court in *Griffin v. Griffin*, *supra*, and *Simon v. Craft*, *supra*, would require such substitution.

3. The cases appear uniformly to hold that a trial by a biased court is not in conformity with due process. *Inland Steel Co. v. National Labor Relations Board*, 109 F. 2d 9, 21 (1940); *National Labor Relations Board v. Ford Motor Co.*, 114 F.2d. 905, 909 (1940).

Items A (2), (3) and (5) of question number 3 are amply developed in the discussion under question number 2, this Petition, pp. 20 to 23.

Item A (1), although on its face innocuous, is the source of much of the difficulty in this case. By the Court's delay in

filing the decision till the last day of December, 1968, when the personnel of both Courts would change on the next day and one of the attorneys for Respondent in this case would become a Judge on the Supreme Court, who would of necessity abstain from all proceedings, the vote, two in favor, two against and one abstaining on all efforts to obtain review before the Supreme Court, resulted. The footnote on page 648 of the official report of this case, 242 N.E. 2d 642, shows that the vote on this opinion was taken, at the very latest, on the 21st day of November, 1968, the date of Judge Cook's death. See 140 Indiana Appellate, p. XXX, VII, In Memoriam. Appendix D, p. 77.

Item A (6) in question 3 involves the Court's determination to enforce its mandate as a money judgment for Respondents and furnish an enforceable Order even to the extent of making changes *sua sponte* and inconsistent with Respondents' prayer.

This was an action in mandate. The primary relief sought was an order directing the Petitioners to perform their duties under House Enrolled Act 1818. On December 31, 1968, the trial Court entered a finding that House Enrolled Act 1818 had been the law since January, 1967, reversed the pocket veto law, and held that Respondent should have judgment but did not issue its mandate.

That the trial Court's mandate is its judgment in a mandate case is recognized by the Indiana Supreme Court in *Shrader, Road Supervisor v. State ex rel. Mason*, 157 Ind. 341, 61 N.E. 721 (1901), where the Court said "the Court on June 12, 1900 rendering its final judgment, whereby preemptory writ of mandate was directed to issue against Shrader."

Within the period from October 21 to December 16, 1969 the Appellate (trial) Court issued four distinct mandate

orders, which were to operate as orders of execution to satisfy a money judgment against the State for the benefit of the M.T.A. (the City of Indianapolis, not a party of record, received the money) and the Respondent attorneys.

CONCLUSION

For the above reasons Petitioners respectfully suggest that a writ of certiorari should issue to review the judgment and opinion of the Appellate Court of Indiana.

Respectfully submitted,

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